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Supreme Court, U.S.
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In The Supreme Court of the United States

JOANNE HEDRICK,
Petitioner,

v.

WESTERN RESERVE CARE SYSTEM; FORUM HEALTH,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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June, 2004

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SUPPLEMENTAL APPENDIX

MEMORANDUM OF OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

United States District Court
for the Northern District of Ohio, Eastern Division
Case No. 4:99 CV 630
Filed June 27, 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOANNE HEDRICK	) **CASE NO. 4:99 CV 00630**
	)
Plaintiff	) **JUDGE LESLEY WELLS**
	)
- vs -	) **MEMORANDUM OF**
	) **OPINION AND ORDER**
WESTERN RESERVE	) **GRANTING DEFENDANTS'**
CARE SYSTEM, et al.	) **MOTION FOR SUMMARY**
	) **JUDGMENT & DENYING**
Defendants	) **PLAINTIFF'S MOTION FOR**
	) **PARTIAL SUMMARY**
	) **JUDGMENT**

This case is currently before the Court on Defendants Western Reserve Care System (WRCS) and Forum Health's motion for summary judgment and Plaintiff Joanne Hedrick's motion for summary judgment. For the reasons that follow, defendants' motion for summary judgment is granted, and plaintiff's motion for partial summary judgment is denied.

On 17 March 1999, Joanne Hedrick filed a complaint against defendants alleging that they discriminated against her on the basis of her disability, in violation of the Americans with Disabilities Act, 42 U.S.C. §12102 (ADA) and Ohio Revised Code (ORC) §4112 and her age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et*

seq (ADEA).[1] On 1 May 2000, defendants filed a motion for summary judgment (doc. no. 20) and Plaintiff Hedrick filed a motion for partial summary judgment against WRCS (doc. no. 24). The parties filed responses and reply briefs and the cross-motions for summary judgment were referred to Magistrate Judge Nancy A. Vecchiarelli for a Report and Recommendation (R&R). The Magistrate Judge filed her R&R recommending that defendants' motion for summary judgment be granted and that plaintiff's motion for partial summary judgment be denied.

I. BACKGROUND FACTS

The relevant background facts are set forth in the R&R as follows:

> In 1973, Hedrick began working for WRCS and its predecessors as a general duty staff nurse. As a staff nurse, Hedrick performed typical bedside nursing functions. During the 1980s, Hedrick was diagnosed with osteoarthritis in her left knee. Since that time, Dr. L. Kevin Nash, her primary care physician, and Dr. Raymond Duffett, an orthopedic surgeon, have treated her for arthritis in both knees.
>
> On December 1, 1995, Hedrick fractured her femur. While recuperating, she was unable to work and took a leave of absence from work. She

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[1] Hedrick filed an amended complaint on 14 January 2000. (Doc. no. 16).

recovered from the fracture, and Dr. Duffett released her return to work as of June 1, 1996. Dr. Duffett did not place any restrictions on Hedrick and advised her to walk a lot.

On May 3, 1996, Hedrick went to see Dr. Nash and told him she did not think she could return to work and perform her duties because her arthritis worsened after the fracture. Dr. Nash indicated in his notes:

> [Hedrick] has made good progress in the past month. Dr. R. Duffett has told her that she can return to work 6/1 – she is scared [ ] to consider this, but this may actually be a reasonable goal…

(Nash Dep., Exh. D, attached to Defendants' Motion for Summary Judgment).

On July 1, 1996, Dr. Nash reported to Sue Yoder, the Director of Nursing, that:

> Ms. Joanne Hedrick has been making a very slow recovery after her devastating fracture of the left femur. Joanne has shared with me that she does not believe that she is going to be able to return to bedside nursing, and frankly I share her reservations.

(Nash Depo., Ex. J).

On July 16, 1996, Hedrick underwent a Functional Capacity Evaluation to determine her limitation and

ability to work. The evaluation indicated that Hedrick "would not be able to return to her previous level of function as a staff nurse at Western Reserve Care System secondary to limitations in bending, lifting, and pain in knees." (Steen Depo., Ex. 13, p. 14, attached to Plaintiff's Motion for Summary Judgment). On August 7, 1996, Dr. Nash wrote a letter to Jon Steen, the Human Resource Director, stating:

> Hedrick has been recuperating from a complicated fracture of her left femur. Recently, she underwent a functional performance evaluation which indicated that she is not going to be able to return to work in her previous position as a general staff nurse at Western Reserve Care System. Accordingly, I recommend that she be considered for other positions within the organizations.

(Steen Depo., Ex, 13, p. 16). In a follow-up letter, Dr. Nash described Hedrick's limitations as:

1. Daily activities for short intervals
2. Able to walk for short distances
3. Able to stand for short periods of time
4. Able to [do] desk work (i.e. type, computer skills, filing) for short periods of time due to difficulty in maintaining a persistently flexed or extended aspect with her left leg.

5. Able to drive a care for short periods of time. (Steen Depo., Ex. D, p. 18).

In July or August, 1996, Hedrick requested to be placed on a list of employees claiming to have permanent work restrictions, referred to as the "ADA list." Once placed on the list, WRCS attempted to find suitable employment for employees who could no longer perform their regular jobs. Once Hedrick was placed on the list, WRCS began to identify vacancies which would correspond with her restrictions.

In September 1996, WRCS informed Hedrick of an opening for a Referral Center scheduler. Hedrick interviewed for the position. Hedrick claims that during the interview, she was asked about her ability to walk and get in and out of a chair. She told the interviewers that she would not have any problem with those tasks. However, upon learning the salary, Hedrick indicated that she was not interested in the job because it was too low. Hedrick testified during her deposition that she believed she could have had the job had she wanted it, but that she rejected the position because she was overqualified and the salary was too low. (Hedrick Depo., p. 36-7).

In late September 1996, WRCS informed Hedrick of a Quality Assurance position which was opening. In November 1996, Hedrick interviewed for the job. Hedrick recalls telling the interviewer that although

she would not have a problem walking, she might walk slower than someone else. She also recalls telling the interviewer that she would be able to carry things. Hedrick claims that she asked for permission to park in the physicians' parking lot, which was closer to the hospital. Hedrick was not offered the position. Instead, Dan Donatelli was selected to fill the vacancy.

In January 1997, WRCS also informed Hedrick of four Case Manager vacancies in the Department of Medicine. Hedrick met the minimum qualifications for the positions and was referred to Dr. Bunn, the chairman of the Department of Medicine, for an interview. Hedrick claims that during the interview, Dr. Bunn asked her about her physical limitations and she responded that she would have no problems. Dr. Bunn selected four other applicants to fill the positions.

In March 1997, WRCS informed Hedrick of another Quality Assurance position which was opening. She was told that she would be considered for the position, but that it was unnecessary to interview because she had recently interviewed for the other similar position. Another applicant was selected to fill that position.

In August 1997, WRCS contacted Hedrick regarding a temporary assignment as an Admission

Nurse. Hedrick accepted the assignment, returned to work for WRCS on August 25, 1997, and continues to work as an Admission Nurse for WRCS. Since accepting that assignment, Hedrick has not interviewed for any other Quality Assurance or Case Manager positions that have become available.

Hedrick now claims that WRCS discriminated against her on the basis of her disability and her age because they did not assign her to the Quality Assurance and Case Manager positions and instead filled the vacancies with younger people who were not disabled.

In their Motion for Summary Judgment, Defendants argue that (1) Hedrick never worked for Forum Health, which is merely a parent holding company that cannot be liable for discrimination, and, therefore must be dismissed; (2) Hedrick was not disabled within the meaning of the ADA; (3) Hedrick was offered a reasonable accommodation, but she refused the assignment; and (4) Hedrick was not entitled to reassignment to the Quality Assurance and Case Manager positions as [ ] an accommodation, because those positions were not comparable to her position as a staff nurse.

R&R pp.2-6.

In her motion for partial summary judgment, Hedrick seeks summary judgment on two issues: (1) whether she was

disabled within the meaning of ADA and O.R.C. §4112 at the time WRCS denied her the vacant positions; and (2) whether WRCS failed to reasonably accommodate her by refusing to place her in the vacant positions for which she applied and was qualified.

II. PLAINTIFF'S OBJECTIONS

Under Fed. R. Civ. P. 72(b) and 28 U.S.C. §636(b)(1)(C), the Court reviews de novo the portion of the Magistrate Judge's R&R to which specific objection was made.

Hedrick objected to the following conclusions in the R&R:[2]

(1) that Hedrick provided no direct evidence of discrimination based on disability;

(2) that Hedrick failed to establish that (a) she was substantially limited in a major life activity; (b) there was a record of her disability; or (c) she was "regarded as" disabled within the meaning of the ADA by WRCS;

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[2] Defendant argues that Hedrick has waived her objections to some or all of the R&R because her objections are not specific. Although the Court agrees that many of Hedrick's objections are general in nature, she does cite to specific pages in her previous briefs for her arguments in support of her objections. The Court, therefore, will consider her objections "specific".

(3) that she failed to establish that she was a qualified individual with a disability because she did not show that she proposed, and was denied, a reasonable accommodation;

(4) that she had not established a prima facie case of disability discrimination;

(5) that WRCS asserted a legitimate reason for refusing to assign Hedrick to the available Quality Assurance and Case Manager positions for which she was qualified;

(6) that she failed to produce any evidence showing that WRCS's reason for not assigning her to the vacant positions she desired and for which she was qualified was pretextual;

(7) recommending that Hedrick's motion for partial summary judgment be denied; and

(8) that defendants were entitled to summary judgment dismissing her age discrimination claim.[3]

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[3] Hedrick has not objected to the Magistrate Judge's recommendation that defendants be granted summary judgment on Hedrick's claim against Forum Health because she did not exhaust her administrative remedies with regard to the claims against Forum Health and failed to show that WRCS and Forum Health should be treated as a single employer. She also does not object to the conclusion that by failing to argue that obesity was a disability in her motion for partial summary judgment or in her response to defendants' motion for summary judgment, she waived this argument.

III. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56, summary judgment is appropriate if the evidence in the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has further explained:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett , 477 U.S. 317, 322-23 (1986). Where the nonmoving party bears the burden of proof in the case, the initial burden on the moving party under Rule 56 "may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case." Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1087 (6th Cir. 1996).

"When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The "mere existence of a scintilla of evidence in support of the [nonmovant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, Matsushita Elec. Industrial Co. v. Zenith Radio Corp. , 475 U.S. 574, 587 (1986), but "conclusory allegations standing alone will not defeat a properly supported motion for summary judgment." White v. York Int'l Corp., 45 F.3d 357, 363 (10th Cir. 1995).

IV. ANALYSIS

A. ADA.

The crux of Hedrick's dispute with WRCS is that WRCS discriminated against her by denying her employment in the Quality Assurance or Case Manager positions as a reasonable accommodation to her disability that rendered her unable to continue in her previous position of staff nurse.

The ADA provides that a covered employer may not "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and any

other terms, conditions, and privileges of employment." 42 U.S.C. §12112(a). More particularly for purposes of these motions, the Act provides that the term "discriminate" includes "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant." 42 U.S.C. §12112(b)(5)(B).

To recover on a claim of employment discrimination based on a disability under the ADA and Ohio law, [4] the plaintiff must show that he or she: (1) is disabled within the meaning of the Act; (2) is otherwise qualified for the job, with or without reasonable accommodation; and (3) suffered an adverse employment decision because of his or her disability. Monette v. Electronic Data Systems, 90 F.3d 1173, 1178 (6th Cir. 1996). An individual seeking redress for alleged discrimination under the ADA can proceed by presenting direct evidence of discrimination, or by introducing indirect or circumstantial evidence of discrimination, sufficient to establish a prima facie case or presumption of discrimination.

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[4] Because the essential elements of an ADA claim and a claim under the Ohio handicap discrimination statute are the same, the analysis under of Hedrick's ADA claim also resolves her handicap discrimination claims under Ohio law. Wohler v. Toledo Stamping & Mfg. Co., 125 F.3d 856, **2 n. 1 (6th Cir. 1997); Hoffman v. Fidelity Brokerage Servs., Inc., 959 F.Supp. 452, 457 n. 1 (W.D. Ohio 1997).

Where, as here, a plaintiff uses the indirect method of proof by establishing a prima facie case of discrimination, the burden shifts to the employer to produce evidence of a legitimate nondiscriminatory reason for the adverse employment decision. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Monette, 90 F.3d at 1185-86. Under the burden shifting approach of the McDonnell Douglas formula, if the employer articulates a legitimate, nondiscriminatory reason for the employment action, the burden shifts back to the plaintiff to show that the employer's stated reason is pretextual by providing evidence from which a jury could determine that the adverse action was based solely on the employee's disability. Monette, 90 F.3d at 1185-86. Where the plaintiff chooses the direct method of proof, the burden does not shift to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. Id. at 1180. Instead, the employee must show that the adverse action was based solely on his or her disability. Id.

1. Direct Evidence.

Hedrick's first objection is to the Magistrate Judge's conclusion that she provided no direct evidence that WRCS discriminated against her by not transferring her to the vacant Quality Assessment and/or Case Manager positions as a reasonable accommodation for her disability. Specifically, Hedrick argues that the statement made by Lorraine Nelson to Dr. Nash, in which Nelson "expressed concern to me that she

felt that JoAnn's [sic] medical condition would prohibit her from being able to perform this job as a case manager" (Nash depo, p. 68), is evidence of a discriminatory animus.

The direct evidence standard essentially requires an admission by the employer, or other direct evidence, that it relied solely on the disability in making the adverse employment decision. Monette, 90 F.3d at 1178. Lorraine Nelson's comment to Dr. Nash regarding her concern about Hedrick's medical condition and the ability to perform the Case Manager position is not sufficient to raise a genuine issue of material fact that WRCS relied solely on Hedrick's alleged disability in making its decision not to place her in the Quality Assessment or Case Manager positions. As set forth below, without more, this isolated comment does not establish direct evidence of discrimination.

Hedrick cites Ross v. Campbell Soup Co., 237 F.3d 701 (6th Cir. 2001) in her citation of supplemental authority in support of her objection to the Magistrate Judge's conclusion that she has not provided direct evidence. Ross, however, is distinguishable. In Ross, the Sixth Circuit found that a memo referring to the plaintiff as a "back case" and inquiring when this "problem person" could be brought to "termination status" was direct evidence of discrimination. Id. at 704, 706-707. Although the district court had determined that this "isolated reference" was insufficient to constitute direct evidence of a discriminatory animus, the Sixth Circuit disagreed. Id. It found that the memo was not an isolated

reference but occurred in the context of events reflecting on Ross's back condition and his ultimate termination from Campbell Soup Company, "including the invitation for Ross to retire and the proffered resume assistance, the creation of a memo tracking Ross's injury-related absences from work, Ross's receipt of a letter detailing his ability to COBRA his health benefits, and the comment made to Ross that 'we can't have any more of this back thing.'" Id. at 707. For the Sixth Circuit, these events taken together demonstrated the prominence of Ross's back condition in Campbell's decisions regarding his employment. Id.

In this case, however, Ms. Nelson's alleged concern about Hedrick's ability to perform the required duties of the Case Manager position is an isolated comment. There is no series of comments or reports from WRCS indicating that Hedrick's osteoarthritis figured prominently in its decision to hire others instead of her for the Qualified Assessment and Case Manager positions. Hedrick argues that this "concern" combined with other factors constitutes direct evidence. However, the fact that WRCS agreed with Hedrick's assessment that she could not continue in her previous position of staff nurse, tried to accommodate her physical impairment by finding her another position in the hospital, and asked her about her physical ability to perform the specific functions of the positions for which she interviewed, do not constitute direct evidence – even when taken in the context of Ms. Nelson's "concern" – that WRCS denied her

the positions she sought solely based on her physical impairment.

Therefore, the Court concludes that the evidence presented by Hedrick is not direct evidence of discrimination.

2. Indirect Evidence.

To survive defendants' motion for summary judgment, Hedrick must rely on indirect evidence by establishing a prima facie case, or presumption of discrimination, under the McDonnell Douglas formula as adapted to ADA claims.

A plaintiff establishes a prima facie case of disability discrimination by showing that: (1) he or she is disabled; (2) he or she is otherwise qualified for the position, with or without reasonable accommodation; (3) he or she suffered an adverse employment decision; (4) the employer knew or had reason to know of the plaintiff's disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced. Monette, 90 F.3d at 1186. The parties dispute only the first two elements of Hedrick's prima facie case: whether she was disabled within the meaning of the ADA and, if so, whether WRCS provided her with a reasonable accommodation under the Act, when it offered her the position of Referral Center Scheduler position.

a. Definition of Disability Under the ADA.

In her second objection to the R&R, Hedrick objects to the Magistrate Judge's determination that she does not meet the definition of "disabled" within the meaning of the ADA.

The parties do not dispute that Hedrick's osteoarthritis is a physical impairment. They do, however, disagree on whether this physical impairment meets the definition of "disability" under the ADA. The Act defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(2). Hedrick asserts that she has presented evidence under each of the Act's three methods of establishing disability sufficient to defeat defendant's motion for summary judgment and to establish disability under her motion for partial summary judgment.

I. Physical Impairment that Substantially Limits a Major Life Activity: 42 U.S.C. 12102(2)(A).

Hedrick claims that the osteoarthritis in both her knees constitutes a disability under the ADA because it is a physical impairment that substantially limits her major life activities. Because the parties agree that Hedrick's osteoarthritis is a physical impairment, the disputed issue is whether her osteoarthritis "substantially limits one or more major life activities." 42 U.S.C. §12102(2)(A).

Hedrick does not provide the Court with a clear statement of the "major life activities" she claims are substantially limited by her osteoarthritis. However, in her objections to the R&R, she relies on several pieces of evidence to support her claim.

First, Hedrick relies on a Functional Capacity Evaluation that defendants performed on Hedrick in July of 1996:

> Position Work Tolerance/Limitations: Client had limitations with most nonmaterial handling activities. In a seated position, client reports being able to sit for a few hours but with knee in a nonbent position secondary to increase knee pressure. Standing was limited to a few minutes. Walking was limited to approximately 30 minutes continuously. Stair climbing was limited to 2 flights maximum x 22 steps. Crawling, kneeling and squatting were not assessed secondary to knee pain…
>
> * * *
>
> RECOMMENDATIONS:
>
> 1. Nursing skills limited to activities avoiding bending, squatting, patient transfers, and excessive walking."

(Steen depo., Ex. 13, pp. 14-15.)

Next, Hedrick points to her own deposition in which she explains:

> I can no longer have activities like bowling, walking. I can't bend at the knees. I can't kneel. I can't stand for long periods of time. What used to take me an hour to two hours to do to clean, I can't do it because I have to take rests between because of the knees.

(Hedrick depo, p. 91), Although not specifically relied on by Hedrick, the Court also notes Hedrick's deposition in which

she testified that when asked during her interviews for the Referral Center Scheduler and Quality Assurance positions if she would have trouble walking, she stated that she would not, that she "may not walk as fast as others but [ ] can get from point A to point B", and that her physician had only advised that she not walk "long distances". (Hedrick depo, pp. 33, 40-41, 45).

Finally, Hedrick submits evidence from Dr. Nash, her primary treating physician. Specifically she relies on Dr. Nash's affidavit, dated 6 April 2000, in which he opines:

> Based on my treatment of Joanne Hedrick, my review of her medical records [ ], my knowledge of the Americans with Disabilities Act, and my professional education, training and experience, it is my opinion to a reasonable degree of medical certainty that Joanne Hedrick's osteoarthritis to both knees has caused her to be disabled within the meaning of the [ADA] prior to and continuously since July of 1996."

(Nash Aff. ¶5.) She also relies on a letter attached to the affidavit from Dr. Nash to plaintiff's counsel dated 14 March 2000, in which he states that "Ms. Hedrick's osteoarthritis is a physical impairment constituting a disability that substantially limits her ability to walk and perform her activities of daily living", and that she is "significantly limited with respect to her ability to stand in place, remain in a seated position, climb stairs, crawl, kneel and squat." (Nash Aff. Ex. C.) Finally, she submits testimony from Dr. Nash's

deposition that she is unable to perform a number of nursing functions such as walking for long periods of time, lifting patients, working in an operating room and responding to emergency situations. (Nash depo., pp. 89-93).

The Court has independently reviewed Hedrick's medical records (dating from 1993 to 2000) attached to Dr. Nash's affidavit. Although not relied on by Hedrick, the Court finds a series of letters between Dr. Nash and Jon Steen, WRCS Human Resource Director, to be relevant in determining whether Hedrick's osteoarthritis was a disability under the Act. On 7 August 1996, Dr. Nash wrote to Jon Steen informing him that the functional capacity evaluation of Hedrick "indicated that she is not going to be able to return to work in her previous position as a general staff nurse" and recommending that "she be considered for other positions within the organization." (Nash Aff., Ex. E, doc. no. M336.) In his reply dated 16 September 1996, Steen asks Nash to "provide [him] with a listing of [Hedrick's] limitations so the [WRCS] can evaluate her for other vacancies as they occur." (Nash Aff., Ex. E, doc. no. M337.) On 24 September 1996, Dr. Nash responded to Steen's request by attaching a copy of the Functional Capacity Evaluation and stating that he agreed with the evaluation and it recommendations. He summarized Hedrick's limitations at that time as follows:

1. Daily activities for short intervals
2. Able to walk short distances
3. Able to stand for short periods of time

4. Able to [ ] desk work (i.e. type, computer skills, filing) for short periods of time due to difficulty in maintaining a persistently flexed or extended aspect with her left leg
5. Able to drive a car for short periods of time.

(Nash Aff., Ex. E, doc. no. M357).[5]

Although the Act does not define the terms "major life activity" or "substantially limits", agency regulations provide guidance as to their meaning.[6] HEW Regulations define "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1630.2(I). The term "substantially limits" means "unable to perform a major

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[5] There is a similar letter from Dr. Nash to Jon Steen dated 23 September 1996. However, the letter is unsigned and appears to be a draft. (Nash Aff., Ex. E, doc. no. M338.)

[6] There are two potential sources of regulatory guidance for interpreting ADA provisions: regulations issued by the Department of Health, Education, and Welfare (HEW) interpreting the Rehabilitation Act of 1973, 29 U.S.C. §706(8)(B) and the Equal Employment Opportunity Commission (EEOC) guidelines interpreting the ADA. Toyota Motor Mfg., Inc. v. Williams, 122 S.Ct. 681, 689 (2002). The persuasive authority of the HEW Rehabilitation Act guidelines has been recognized. Id. However, the persuasiveness of the EEOC regulations is less clear, as Congress has not authorized any agency to issue regulations interpreting the ADA. Id.

life activity that the average person in the general population can perform; or [ ] significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. §1630.2(j).

The United States Supreme Court has recently examined the terms "major life activities" and "substantially limited" as used in the ADA, and determined they must be strictly interpreted to create a demanding standard for qualifying as disabled under the ADA. Toyota Motor Mfg., Inc. v. Williams, 122 S.Ct. 681, 691 (2002). According to the Court in Williams, major life activities refer to "those activities that are of central importance to daily life." Id. Furthermore, individuals attempting to prove disability status under this test must do more than submit evidence of a medical diagnosis of an impairment. "Instead the ADA requires those 'claiming the Act's protection... to provide a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience... is substantial." Id. at 691-92 (quoting Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 567 (1999)). Whether or not a plaintiff is disabled within the meaning of the Act requires an individualized inquiry. Sutton v. United Air Lines, Inc., 527 U.S. 471, 483 (1999); Cotter v. Ajilon Services, Inc., 287 F.3d 593, 598 (6th Cir. 2002). An individualized assessment

of the effect of an impairment is particularly important where the symptoms of that impairment vary widely between individuals. Williams, 122 S.Ct. at 692.

(A) Walking, sitting, standing and climbing stairs as major life activities

Hedrick's evidence must show that her impairment prevents or severely restricts her from doing activities that are of central importance to most people's daily lives. Williams, 122 S.Ct. at 691. From the evidence Hedrick submitted, walking, sitting, standing and climbing stairs qualify as activities that are central to most people's lives – and are, therefore, major life activities. Bowling, crawling, kneeling and squatting are not major life activities.

As her primary treating physician, Dr. Nash's testimony and records regarding Hedrick's impairment are relevant. Under Williams, however, his conclusory opinion that her osteoarthritis has caused her to be disabled under the Act does nothing to further her claim, because it provides no evidence of how her impairment affects her activities. 122 S.Ct. at 691. Likewise, his conclusion that she is "significantly limited with respect to her ability to stand in place, remain in a seated position, climb stairs", etc. does little to inform the Court about how Hedrick's limited ability to perform these activities compares to the "condition, manner, or duration under which the average person in the general population can perform these activities." See 29 C.F.R. §1630.2(j). More to the point, Dr. Nash's 21 September 1996 letter to Jon Steen

provides the type of evidence the Court requires to determine whether Hedrick is disabled under the ADA because he describes the activities in which Hedrick is limited and the extent of her limitation. In particular, he states that she is able to walk short distances, and to stand, do desk work, drive a car and perform unspecified "daily activities" for short periods of time. He also states that he agrees with the Functional Capacity Evaluation and its recommendations.

The Functional Capacity Evaluation is more precise in describing the extent to which her osteoarthritis limits Hedrick's activities. According to the Functional Capacity Evaluation, Hedrick's walking was limited to 30 minutes, stair climbing was limited to two flights, and sitting was limited to a few hours. Hedrick also testified that although she might be slower than another person, she could walk "from point A to point B", and did not consider the walking involved in the Referral Center Scheduler or Quality Assurance positions to be a problem. As for standing, Hedrick's testimony is that she cannot stand for long periods of time.

Although her ability to perform these activities is limited, it is not "significantly restricted" compared to the condition, manner or duration under which the average person in the general population can perform those same major life activities. 29 C.F.R. §1630.2(j). There is no showing that the average person in the general population walks more than 30

minutes consecutively, climbs more than two flights of steps at a time, sits for more than a few hours at a time or stands for long periods of time. Hedrick has not shown, therefore, that these limitations, are "substantial" within the meaning of ADA, or that she is significantly restricted in the "condition, manner or duration" that she can perform these activities compared to the average person in the general population.

(B) Working as a major life activity.

As for the testimony of Dr. Nash that she is unable to perform a number of nursing functions such as walking for long periods of time, lifting patients, responding to emergency situations, and working in an operating room (Nash depo., pp. 89-93), it is unclear from the briefs filed if Hedrick submits this evidence in support of a claim that her physical impairment substantially limits her in the major life activity of working. Nevertheless, the Court will assume that she does claim that she is substantially limited in the major life activity of working and examine her evidence accordingly.[7]

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[7] To the extent Dr. Nash's testimony may be intended to bolster her claim that she is substantially limited in the major life activities of walking, sitting, standing and climbing stairs, her limited ability to perform certain fairly rigorous nursing functions, such as responding to emergency situations, lifting patients and working in an operating room, does not demonstrate that she is significantly restricted in the "condition, manner or duration" that she can walk, sit, stand or climb stairs, compared to the condition, manner or duration

Regarding the major life activity of working, the Supreme Court has held that a claimant is required to show an inability to work in a "broad range of jobs," rather than a specific job. Williams, 122 S.Ct. at 693; Sutton v. United Air Lines, Inc., 527 U.S. 471, 491 (1999). As the Court in Sutton explained:

> To be substantially limited in the major life activity of working... one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Sutton, 527 U.S. at 492. Considering the broad range of nursing jobs, the evidence shows that while there may be certain rigorous nursing functions that Hedrick can no longer perform, such as walking for long periods of time, lifting patients, responding to emergency situations, and working in an operating room (Nash depo., pp. 89-93), there are nursing jobs she can perform that utilize Hedrick's nursing skills, including the Referral Center Scheduler, Quality Assurance, Case Manager and Admission Nurse positions. Under the standards articulated in Sutton, therefore, Hedrick is not

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under which the average person in the general population performs the same activities.

precluded from a substantial class of jobs. Id. The fact that she is no longer able to perform the functions required by the position of staff nurse, or other rigorous nursing functions, is insufficient to create a genuine issue of material fact regarding a substantial limitation in the major life activity of working.

In conclusion, therefore, the evidence presented is insufficient to create a genuine issue of material fact from which a reasonable trier of fact could conclude that Hedrick's impairment of osteoarthritis in the knees substantially limits her in the major life activities of walking, standing, sitting or climbing stairs or in the major life activity of working. Accordingly, the Court concludes that her impairment does not constitute a disability within the meaning of 42 U.S.C. §12102(2)(A).

ii. Record of a Disability: 42 U.S.C. §12102(2)(B).

Hedrick also objects to the R&R's conclusion that she has not shown that WRCS's records establish her disability under 42 U.S.C. §12102(2)(B) of the Act. She claims that her physicians' letters to the hospital regarding her injury, her leave of absence, the Functional Capacity Evaluation, and her placement on WRCS's "ADA List" establish a record of her disability under the ADA. However, these records merely indicate that WRCS had a record of Hedrick's physical impairment that limited her in certain activities – in particular that she was unable to continue in her position of staff nurse. Hedrick has not provided records showing that she was substantially limited in a major life activity as required by the

ADA. Therefore, the records do not raise a genuine issue of material fact that WRCS had a record of a physical impairment that substantially limits her in a major life activity. See 42 U.S.C. §12102(2)(B).

iii. Regarded As Disabled: 42 U.S.C. §12102(2)(c).

Finally, Hedrick objects to the Magistrate Judge's conclusion that WRCS did not regard her as having a disability that substantially impairs a major life activity.

To be "regarded as" disabled under the ADA, the Supreme Court has provided as follows:

> There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperception is about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often "resul[t] from stereotypic assumptions not truly indicative of... individual ability."

Sutton, 527 U.S. at 489 (citing 42 U.S.C. §12101(7) and School Bd. of Nassau Cty. V. Arline, 480 U.S. 273, 284

(1987)). Therefore, to meet the "regarded as" definition of disabled under the Act, Hedrick must show that defendants mistakenly regarded her osteoarthritis as "substantially limiting" a "major life activity" within the meaning of the ADA. To avoid summary judgment, she must raise a genuine issue of material fact on this issue.

In support of her claim, Hedrick first points to the fact that WRCS "was advised and agreed" that she could not resume her staff nurse position and relied on the Functional Capacity Evaluation and letters from her physicians that she would not be able to return to her previous positions. The Court has addressed why these facts do not create a genuine issue of material fact that Hedrick is actually disabled under the ADA. For the same reasons, these facts, without evidence of any misperception, cannot create a genuine issue of material fact that WRCS regarded her as "substantially limited" in a "major life activity."

Next, Hedrick argues that WRCS's placement of her on the so-called "ADA list" establishes that defendant regarded her as disabled, or at least creates a genuine issue of material fact on that issue. This is a closer question. The fact that defendant had a list, which was sometimes referred to as the "ADA list", raises a legitimate question as to whether a jury could find that WRCS regarded Hedrick as disabled within the meaning of ADA. On examination, however the Court concludes for the following reasons that placement on the so-called "ADA list" does not create a genuine issue of material

fact of whether WRCS regarded her as substantially limited in a major life activity.

Although Hedrick relies on the deposition of Jon Steen, the Human Resource Director for WRCS, to support her claim that by placing her on the "ADA list" WRCS considered her disabled, Mr. Steen's deposition does not support her claim. According to Steen, the list was created around the time the ADA was enacted as a way to implement its preexisting practice of trying to accommodate employees with permanent, physical restrictions by placing them in positions that better suited their limitations. Steen testified that an employee is placed on the list by requesting an accommodation, and only after WRCS verifies that the employee has a permanent restriction. Employees on the list can either no longer perform the functions of their previous position or have difficulty doing so. (Steen Depo., pp. 16-26).

There is no evidence that WRCS made any attempt to determine whether the individuals who are placed on the list are "substantially limited" in a "major life activity". As discussed while analyzing Hedrick's claim that she is actually disabled, a determination of disability under the ADA requires a separate analysis of the individual's impairment, the activities the impairment restricts and the extent to which those activities are restricted. Here WRCS simply determined that employees placed on the list have a physical impairment that makes performing their former job difficult or impossible. The fact that WRCS attempted to accommodate employees with permanent physical restrictions, who might

not be able to perform the functions of their former positions, is not sufficient to create a genuine issue of material fact that WRCS mistakenly concluded that Hedrick's osteoarthritis "substantially limits" her in a "major life activity".

Finally, Hedrick claims that WRCS regarded her as "disabled" because, when she interviewed for positions after being placed on the ADA list, WRCS officials asked her questions evidencing that they were conscious of, and concerned about, her limited ability to walk. This is further demonstrated, she claims, by the fact that she asked for and was told that if she was offered the position she could have a parking space close to the building to accommodate her need to cut down on long-distance walking.

This is not evidence that defendant entertained any misperceptions about Hedrick being disabled. Hedrick had informed WRCS that she could no longer continue in her previous position of staff nurse, in part because she could not walk long distances. The fact that WRCS officials questioned her about her physical restrictions in the context of performing the duties of the job for which she was interviewing shows that they recognized that she had a physical restriction and supports the premise that they were trying to accommodate her. The ADA was enacted, not to accommodate every American with a physical or mental impairment, but only those whose impairments substantially limit a major life activity. See Toyota Motor Mfg. v. Williams, 122 S. Ct. 681, 691 (2002). Standing along, the

fact that an employer attempts to accommodate an employee with a physical impairment, who is not actually disabled within the meaning of 42 U.S.C. §12102(2)(A), cannot then be used to demonstrate that the employee was "regarded as" disabled under 42 U.S.C. §12102(2)(C).

Hedrick has not submitted evidence sufficient to raise a genuine issue of material fact that WRCS "regarded" her as having an impairment that substantially limited a major life activity.

In conclusion, Hedrick has failed to establish that she is a member of the ADA's protected class. She has not presented sufficient evidence to raise a genuine issue of material fact that she (1) has a physical or mental impairment that substantially limits a major life activity; (2) has a record of such an impairment; or (3) was "regarded as" having such an impairment by WRCS. Therefore, WRCS is entitled to summary judgment on Hedrick's disability claims.

b. Qualified Individual With a Disability.

Even assuming Hedrick could show that she is "disabled" and within the ADA's protected class, to establish a prima facie case of discrimination she must also show that she is a "qualified individual with a disability". The regulations define a "qualified individual with a disability" as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform

the essential function of such position." 29 C.F.R. §1630.2 (m). See also Burns v. Coca-Cola Enterprises, Inc., 222 F.3d 247, 257 (6th Cir. 2000).

Discrimination under the ADA includes not making reasonable accommodations to an employee who is an otherwise qualified individual with a disability, unless the employer can show that the accommodation would impose an undue hardship. Hoskins v. Oakland Cty. Sheriff's Dept., 227 F.3d 719, 724 (6th Cir. 2000) (quoting 42 U.S.C. §1211(b)(5)(A)). In this case, Hedrick claims that WRCS discriminated against her by denying her employment in the Quality Assurance or Case Manager positions she desired as a reasonable accommodation for her alleged disability. To be a qualified individual with a disability, therefore, Hedrick must show that she satisfies the requirements of these positions and can perform the job related functions with or without an accommodation.

A disabled employee who claims to be otherwise qualified with a reasonable accommodation bears the initial burden of proposing an accommodation and showing that the accommodation is objectively reasonable. Cassidy v. Detroit Edison Company, 138 F.3d 629, 633-34 (6th Cir. 1998); Monette, 90 F.3d at 1183.[8] A disabled employee cannot

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[8] An employer then has the burden of persuasion to shown that an accommodation would impose an undue hardship. Cassidy, 138 F.3d at 634. In this case, WRCS does not argue that any of the alleged reasonable accommodations are an undue hardship.

demand that the employer provide her with a particular accommodation when another reasonable accommodation is made available to her. Hankins v. The Gap, 84 F.3d 797, 800-01 (6th Cir. 1996) (citing Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986)); Hoskins, 227 F.3d at 728 n.3. The regulations also provide that an individual who is disabled under the ADA is not required to accept a particular accommodation offered by the employer. However, if the disabled individual rejects a proposed "reasonable accommodation" that enables the individual to perform the position's essential functions that they cannot perform without an accommodation, the individual will no longer be considered a "qualified individual with a disability" under the ADA. 29 C.F.R. §1630.9(d).

The Act and the regulations provided that "reasonable accommodation" may include reassignment to a vacant position. 42 U.S.C. §12111(9)(B); 29 C.F.R. §1630.2(o)(2)(ii). Generally, reassignment to another position is considered only where accommodation in the employee's prior position is not possible. Cassidy, 138 F.3d at 634. Under Sixth Circuit law, when a disabled employee can no longer perform the functions of his or her previous position, even with accommodation, an employer has a duty under the ADA to consider transferring the employee to another position for which that employee is otherwise qualified. Burns, 222 F.3d at 257. However, an employer need only reassign adisabled employee to a vacant position. Id. "Employers are not

required to create new jobs, displace existing employees from their positions, or violate other employees' rights under a collective bargaining agreement or other non-discriminatory policy in order to accommodate a disabled individual." Id. at 257-258, (quoting Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998)). Furthermore, an employer is under no obligation to keep an employee on unpaid leave indefinitely until a suitable position becomes available. Monette, 90 F.3d at 1187.

Generally, an employer is only required to transfer an employee to a position comparable to the employee's prior position as a reasonable accommodation under the Act. See Hoskins, 227 F.3d at 728 n.3. The Act does not require an employer to offer an employee a promotion as a reasonable accommodation. Cassidy, 138 F.3d at 634. However, where a comparable position is not vacant, an employer's obligation to reassign an employee under the ADA may include assignment to a position with a lower grade of pay if the employee meets the jobs qualifications. Cassidy, 138 F.2d at 634.

> The employer must first identify the full range of alternative positions for which the individual satisfies the employer's legitimate, nondiscriminatory pre-requisites, and then determine whether the employee's own knowledge, skills, and abilities would enable her to perform the essential functions of any of those alternative positions, with or without reasonable

> accommodations. The employer's duty to accommodate requires it to consider transferring the employee to any of these other jobs, including those that would represent a demotion.

Burns, 222 F.3d at 257 (quoting Dalton, 141 F.2d at 677).

The parties agree that Hedrick could no longer perform her job as staff nurse and that no reasonable accommodation could be made for Hedrick in that position. They also agree that Hedrick requested a reasonable accommodation when she contacted WRCS and requested to be placed on the "ADA list" so that another position, for which she was qualified, might be found.

The issue in dispute, therefore, is whether there was a "reasonable accommodation" of Hedrick under the Act. WRCS claims that the position of Referral Center Scheduler was a reasonable accommodation. Hedrick was offered the position but turned it down, claiming that the Referral Center Scheduler position was not a reasonable accommodation because she was overqualified for the position.

The evidence shows that in July of 1996 Hedrick requested an accommodation because she could no longer perform the functions of a staff nurse. Even assuming Hedrick was disabled within the meaning of the Act, which this Court has found she was not, Hedrick's request for a reasonable accommodation placed a duty on WRCS to ascertain whether it had an available position that Hedrick would be able to perform. Burns, 222 F.3d at 257.

According to Hedrick's deposition testimony, after placement on the list sometime in July of 1996, Hedrick requested to return to work in August of 1996. Pursuant to WRCS's instructions, Hedrick periodically contacted Anne Marie Ondo, WRCS's Employment Coordinator, to determine what positions WRCS might have available for her. She was informed of the Referral Center Scheduler position and interviewed for that position sometime in September of 1996. During the interview, Hedrick informed Lorraine Nelson that she was not interested in the position because she felt she was overqualified and it was a "drastic" cut in pay from her previous position of staff nurse. (Hedrick depo. p. 36). Although the parties dispute whether WRCS made a formal offer of the position to Hedrick before she told them she was not interested, the facts are undisputed that Hedrick understood that the job was hers if she wanted it.

At this point in time, WRCS absolved itself of its duty under the ADA to make an further reasonable accommodation for Hedrick's alleged disability. Hedrick was qualified for the position and the position accommodated her physical limitations that made performance of the staff nurse position no longer possible. Although Hedrick claims that she was overqualified for the position, Sixth Circuit law obligated WRCS to offer her a vacant position for which she was qualified – even a demotion if a comparable position was not available – as a reasonable accommodation when she

requested a transfer to another position.[9] Burns, 222 F.3d at 257; Cassidy, 138 F. 3d at 634.

Even though Hedrick turned down WRCS's offer of the Referral Center Scheduler position as a reasonable accommodation, WRCS did not terminate Hedrick. See Monette, 90 F.3d at 1187 (employer is under no obligation to keep employees on unpaid leave indefinitely until a comparable position becomes available). Instead, WRCS continued to inform her of positions for which she was eligible to apply until ultimately Hedrick was placed in her current admission nurse assignment in August of 1997. At this point, however, Hedrick could no longer be considered a "qualified individual with a disability" because she had

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[9]If no vacant position exists for which the disabled employee is qualified, but the employer knows that a comparable position for which the applicant is qualified will become vacant in a short period of time, the employer may be required to offer the position to the employee. Monette, 90 F.3d at 1187 (citing 29 C.F.R. pt. 1630 app. at 407-08); Hoskins, 227 F.3d at 728 n.3 (citing Norville v. Staten Island Univ. Hosp., 196 F.3d 89, 99 (2d Cir. 1999)) (reassigning an employee to a position that includes a significant decrease in pay, benefits or seniority, is not "reasonable" under the ADA, where a comparable position for which the employee is qualified is available at the same time). However, Hedrick has made no showing that the Quality Assurance and Case Manager positions were comparable to her staff nurse position, or that WRCS knew these positions were about to become available when it offered her the Referral Center Scheduler position.

already turned down a reasonable accommodation. 29 C.F.R. §1630.9(d). Particularly where a transfer to another position is involved, a disabled employee cannot demand that the employer provide her with a particular accommodation when another reasonable accommodation is made available to her. Hankins, 84 F.3d at 800-01.

The Case Manager and Quality Assurance positions, to which Hedrick claims she was entitled as a reasonable accommodation did not become available until after she turned down the Referral Center Scheduler position – at which point she was no longer "otherwise qualified". Moreover, these positions were non-bargaining unit, salaried positions as opposed to her prior position as an hourly paid bargaining unit staff nurse and Hedrick has not shown that they were comparable to her prior position.

Accordingly, the Court concludes that Hedrick failed to raise a genuine issue of material fact as to the second requirement of her prima facie case – that she was a qualified individual with a disability. WRCS is therefore entitled to summary judgment on this issue.

c. Prima Facie Case of Disability Discrimination.

Although Hedrick objects to the R&R's conclusion that she has failed to establish a prima facie case of disability discrimination under the ADA, as demonstrated above, Hedrick has not raised an genuine issue of material fact regarding the disputed elements of her prima facie case. She has not shown that she was disabled within the meaning of

the Act or that she was an otherwise qualified individual, with or without accommodation. [10]

Because she has failed to establish a prima facie case, WRCS is entitled to summary judgment on Hedrick's claim of discrimination under the ADA and Ohio law.

d. Legitimate Reason for Employment Action.

Although Hedrick has not established a prima facie case of disability discrimination, the Court will address her remaining objections to the R&R. Assuming Hedrick had presented a prima facie case of disability discrimination under the ADA, the employer must then offer a legitimate explanation for its action. Monette, 90 F.3d at 1185-86. Hedrick objects to the Magistrate Judge's conclusion that WRCS had asserted a legitimate reason for refusing to assign Hedrick to the Quality Assurance and Case Manager positions. Although WRCS asserts that Hedrick was not chosen for these positions because she was not the most qualified candidate, Hedrick claims that defendant's reason is

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[10]Hedrick's objection is limited to her claim that she raised a genuine issue of material fact that she is disabled within the meaning of the Act and is, therefore, a member of the ADA's protected class. The Court has already reviewed, and addressed, the evidence which she argues supports her claim that she is actually substantially impaired in a major life activity, has a record of such impairment and/or is regarded as having such an impairment. Having previously concluded that Hedrick did not raise a genuine issue of material fact on these issues, the Court will not revisit them.

conclusory and, therefore, inadequate to discharge its duty under McDonnell Douglas to provide a specific reason for its actions.

The adverse employment action Hedrick claims is WRCS's failure to place her in the Quality Assurance and Case Manager positions as a reasonable accommodation to her alleged disability. Under the McDonnell Douglas burden-shifting test, the employer need only offer or articulate a nondiscriminatory reason for the adverse employment action. Articulating a nondiscriminatory reason for its actions is a burden of production, not persuasion, and does not involve a credibility assessment. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142 (2000). WRCS has produced such a reason. Asserting that it chose the most qualified candidate for each position (which was not Hedrick) is a legitimate, nondiscriminatory reason for the alleged adverse employment action.

e. Pretext.

Under the McDonnell Douglas burden test, assuming the plaintiff had established a prima facie case and the defendant had articulated a legitimate reason for the adverse employment action, the burden returns to the plaintiff to establish that defendant's nondiscriminatory reason is a pretext for unlawful discrimination. Monette, 90 F.3d at 1185-86. Hedrick might demonstrate that WRCS's proffered reason was pretextual by showing that it had no basis in fact, was not the actual reason or was insufficient to explain the decision.

Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 882 (6th Cir. 1996).

Although a plaintiff may show pretext through indirect evidence, the ultimate question remains whether the defendant intentionally and illegally discriminated against the plaintiff. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." Reeves, 530 U.S. at 146. Establishing that the defendant's proffered nondiscriminatory reason for the adverse employment action is unpersuasive or even contrived does not necessarily compel a finding that the plaintiff's claim of discrimination is correct. Id. "For instance, an employer would be entitled to judgment as a matter of law if... the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." Id. at 148.

In support of her argument that defendant's proffered reason is pretextual, Hedrick submits her own testimony that she was the most qualified candidate for the vacant Quality Assurance and Case Manager positions. She also argues that there was conflicting testimony among defendant's officials as to who had the ultimate hiring authority for the vacant Quality Assurance and Case Manager positions, and that some officials had sketchy memories of the hiring decision events and the particular qualifications of the candidates. These facts are insufficient for a jury to conclude that

WRCS's articulated reason that Hedrick was not the most qualified for the positions is false – and also insufficient for a jury to infer that WRCS's real reason for not placing her in those positions was discrimination based on her disability. Moreover, even if Hedrick's submitted evidence were sufficient to cast doubt on the defendant's judgment in hiring for these available positions, a court will not second-guess the business judgment of the employer where the employer chooses from equally qualified candidates for a position. Simms v. Oklahoma, 165 F.3d 1321, 1330 (10th Cir. 1999).

Therefore, the Court concludes that Hedrick has not submitted evidence from which a jury could conclude that WRCS's decision not to place her in the vacant Quality Assurance and Case Manager positions was a pretext for disability discrimination.

For the reasons set forth above, the Court concludes that WRCS is entitled to summary judgment on Hedrick's claim of disability discrimination under the ADA and Ohio law.

3. Denial of Plaintiff's Motion for Partial Summary Judgment.

Hedrick objects to the Magistrate Judge's recommendation that her motion for partial summary judgment be denied. Hedrick moved for summary judgment declaring that (1) she was disabled within the meaning of the ADA and under Ohio Revised Code Chapter 4112; and that (2) WRCS failed to reasonably accommodate her by refusing to place her in the vacant positions for which she applied and was qualified, thereby violating the ADA and Ohio law.

For the reasons discussed above, Hedrick's motion for partial summary judgment is denied.

B. Age Discrimination.

Hedrick claims that WRCS discriminated against her on the basis of her age in violation of the ADEA when it failed to appoint her to the available Quality Assurance and Case Manager positions. Hedrick has not offered direct evidence of age discrimination. To state a claim, therefore, she must prove age discrimination by the McDonnell Douglas method of establishing a prima facie case showing that (1) she is a member of the protected class; (2) she was qualified for the positions she sought; (3) she suffered an adverse employment action; and (4) a younger person was selected for the position she desires. Godfredson v. Hess & Clark, Inc., 173 F.3d 365, 371 (6th Cir. 1999).

The parties do not dispute, and the Magistrate Judge agreed, that Hedrick established her prima facie case. The evidence shows that she (1) is within the protected class because she is over the age of 40, (2) met the minimum qualifications for the positions she desired, (3) suffered an adverse employment action when she failed to get any of the positions she desired, and (4) five of the six successful candidates were younger than she was. Having established her prima facie case, the burden shifts to WRCS to articular a legitimate nondiscriminatory reason for not appointing her to the Quality Assurance and Case Manager positions. Id., Monette, 90 F.3d at 1186-86.

As in the disability discrimination claim, WRCS has asserted that better qualified candidates were chosen to fill the vacant positions instead of Hedrick – a legitimate, nondiscriminatory reason for its action. Therefore, the burden shifts back to Hedrick to show that WRCS's reasons were pretextual. Godfredson, 173 F.3d at 371; Monette, 90 F.3d at 1185-86. Pretext can be demonstrated by showing that the proffered reason has no basis in fact, was not the actual reason for the decision or is insufficient to explain the decision. Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 882 (6th Cir. 1996).

As in her disability discrimination claim, Hedrick argues that WRCS's proffered reason is pretextual regarding age discrimination because of her own testimony that she was the most qualified candidate. She argues that a genuine issue of material fact is shown by conflicting testimony among defendant's officials as to who had the ultimate hiring authority for the vacant positions and sketchy memories of the events surrounding the hiring decisions and the qualifications of candidates. As in her claim of disability discrimination, these facts are insufficient for a jury to conclude that WRCS's proffered reason – that the successful candidates were better qualified than Hedrick – is false. A court will not second-guess the business judgment of an employer who chooses from equally qualified candidates for a position. Simms, 165 F.3d 1321, 1330 (10th Cir. 1999).

Furthermore, under Reeves, Hedrick must provide sufficient evidence from which a jury could infer that age

discrimination was motivating factor in not hiring Hedrick to fill these positions. 530 U.S. 133 (2000). Even if WRCS's proffered reason were disbelieved, the evidence Hedrick presents does not support an inference that age discrimination was the motivating factor in WRCS's hiring decision. Accordingly, defendant's are entitled to summary judgment on Hedrick's age discrimination claim.

V. CONCLUSION

For the reasons set forth above, the Court denies Hedrick's motion for partial summary judgment and grants defendants' motion for summary judgment.

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE